The Interpretation of Clauses in Life Insurance Policies, Limiting Liability for the Risk of Military and Naval Service in Time of War.

Paper read before the Association of Life Insurance Counsel, December 4, 1918, by Eugene J. McGivney, General Counsel of the Pan-American Life Insurance Company of New Orleans, La.

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The invitation to read a paper at this meeting permitted me to select the topic.

The topic that I have selected is one that permits of brief treatment, but I have assumed it to be one of current interest to the members of this Association. At least, it is one that has become very active in my practice. The topic is:

> "The interpretation of clauses in life insurance policies, limiting liability for the risk of military and naval service in time of war."

Apparently the clause was not in general use before the outbreak of the (shall I say) recent war.

The wording of the clauses used in the policies of different companies varies somewhat, but there is such a general resemblance and such a singleness of purpose that a judicial interpretation of any one of the clauses in use will probably be the basis of future litigation.

The clause used by the Pan-American Life Insurance Company, of which I am General Counsel, reads as follows:

> "This policy is free from conditions as to residence, travel and occupation, except that military and naval service in time of war is a risk not assumed under this policy unless, upon written application made by the insured within thirty-one days from entering such service, a written permit therefor, at a rate of extra premium to be fixed by the company, shall be granted, and, if, without such permit, signed by the President, Vice-President, Secretary or Assistant Secretary of the Company, the insured shall enter or be engaged in any military or naval service in time of war and dies while engaged in or as a result of such service, the liability of the company under this policy is limited to the amount of the full legal reserve to the credit of the policy."

The wording of this clause is approximately the same as that used by the great majority of companies.

Manifestly, the purpose of the said clause is to procure an additional premium to take care of the extra hazard involved in military or naval service in time of war. This purpose, so plainly expressed, together with the requirement for a written application for a written permit, and the arrangement that the insured may have thirty-one days after entry into such service to pay the additional premium, it would seem should make it as clear as language could provide, that military and naval service in time of war is a separate risk, to be separately contracted for. Yet this clause in life insurance policies promises to prove a most fruitful source of litigation from claims arising out of the insured engaging in military and naval service in time of war without securing a written permit and without paying the additional premium.

I have searched the reports of decisions of courts industriously, and I have communicated with the General Counsel of a number of companies, in an effort to locate some judicial construction of the military and naval service clause. My efforts were not rewarded with valuable results. The decisions on the subject are few and none that could be considered as authority are directly in point. Therefore, my labor and my remarks on the topic I am discussing can be material to you only in the discovery of the fact that the subject is practically *res nova.*

There are only four cases that I have been able to find that purport to have any direct bearing upon the question. These are the cases of:

1. Welts vs. Connecticut Mutual Life Ins. Co., 48 N. Y. 34, 8 Am. Rep. 518 (a Civil War case, decided in 1871);
2. Larue vs. Ins. Co., 68 Kansas, 539, 75 Pacific 494, (a Spanish-American War case, decided in 1904);
3. Cox vs. Employers Liability Assurance Corporation, 2 Kings Bench Law Reports 629, noted in 1918 L.R.A. "C" (a late English case, decided in 1916);
4. McCahey vs. John Hancock Mutual Life Ins. Co., decided by the Philadelphia Common Pleas Court in 1918, a *nisi prius.* court, reported in the Legal Intelligencer, of date Aug. 2, 1918.

In the first mentioned case of Welts vs. Connecticut Mutual Life Ins. Co., defendant issued a policy payable to plaintiff.

It contained a provision that if the insured entered military or naval service, the policy should be void. Insured was employed by the United States as superintendent in charge of the construction of a bridge upon a railroad which was being used for military purposes, and was working about thirty miles in the rear of the United States army, while the Confederate army was still further south. Four men on horseback gave the foreman certain orders, which he did not obey, whereupon they shot the insured, and he died the next day. The trial judge directed a verdict for plaintiff, and, upon appeal, the judgment was affirmed, the court saying:

> (Page 39): "Entering the military service, within the meaning of the policy, must be taken in its strict or limited sense as most advantageous to the assured, as well as all other provisions therein. The company frames the policy and chooses the language. If there is anything uncertain, it is the right of the assured to enjoy the most favorable rule of construction. The general understanding of the term includes such persons only as are liable to do duty in the field as combatants. . . . There is, in my opinion, an entire absence of any evidence that the deceased was in any military service according to the meaning of the policy. Did he lose his life by the casualties or consequences of war, rebellion, or from belligerent forces? Certainly there is no evidence that this party of four, who came without any of the insignia of war, armed with revolvers only, and doing nothing for the service of the public or Confederate cause, but confining their operations to robberies for their personal advantage, and to the murder of an unarmed man, not in the dress of a Federal soldier, constituted a belligerent force, or any other part of such force. The war or rebellion may be a remote cause of the death, as it was the cause of disorder and lawlessness; but the proximate cause is murder and highway robbery. It would be a very unnatural and forced construction that would relieve the defendants from liability by holding that the four robbers and assassins who murdered Philip J. Welts, and robbed the mechanics and laborers whose work he was superintending, were acting under the authority of the Confederate States. Had the defendants intended to attach such a meaning, the provision would have been directly for exemption from liability for death by violence. The language used can be considered as including only death from casualties or consequences of war or rebellion, carried on or waged by authority of some defacto government, at least. No evidence was produced tending to bring the defendant's case within any such limit."

In this case it will be noted that the insured never entered into military or naval service; therefore, it is not at all in point with the question of the effect of the clause on an insured who has entered such service.

The second mentioned case of Larue vs. Insurance Company, was an action on a policy of life insurance which contained a military and naval clause, reading as follows:

> "Military or Naval Service.—The insured under this policy is permitted to serve in the militia or in the military or naval force of the United States in time of peace without prejudice to his policy; and he may so serve in time of war by giving the Company notice in writing, and paying an extra premium therefor, not to exceed three per cent. per annum upon the amount insured. But should such notice not be given and the extra premium for war hazard not be paid at the time the risk is incurred, the Company will be liable for the reserve only on this policy, computed according to the actuary's table of mortality and four per cent. interest."

There, the insured had, after the issuance to him of the policy of insurance, enlisted in the volunteer service of the United States and went with his regiment to the Philippine Islands, where he was killed by a blow from a weapon in the hands of an insurrecto. It was held that the insured was in the military or naval service within the purview of the policy, and recovery was denied. The court said (page 541):

> "The argument of counsel for plaintiff in error is that the condition requiring notice to the company and payment of an extra premium by a policy-holder serving in the military forces in time of war was to enable the company to protect itself against the extra hazard to life resultant on increased danger to which the insured might be subject when engaged in actual warfare. This contention is illustrated by counsel in supposing that the deceased had lost his life at Fort Riley, in this State, after enlistment, and while his regiment was awaiting orders to move to the Philippine Islands. In such case, it is urged, the fact that the United States might have been engaged in war when the insured died would not be deemed material. Whatever the rights of the plaintiff in error might have been in the hypothetical case assumed by counsel, it is unnecessary to discuss."

In this case it will be noted that the insured died while in actual combat, and the argument of counsel, to the effect that

had the assured lost his life otherwise than in combat the conclusion would be the same, was passed over by the court without expressing any opinion thereon.

The third case of Cox vs. Employers Liability Assurance Corporation is on a policy insuring an army officer against death caused accidentally within the Kingdom, but contained a provision that it did "*not insure against death or disablement, directly or indirectly caused by, arising from, or traceable to . . . war,*" and it appears that after the outbreak of war the insured was assigned to protect a certain railway in England by means of guards; and that it was his duty to visit the guards at night, and that it was necessary for him in doing so to walk alongside the rails; that while he was doing this he was accidentally struck by an engine and killed; that the general public had no right to walk where the accident occurred; that in normal times the spot was illuminated, but at the time of the accident the lights were obscured, in compliance with the Defense of the Realm Act. The court held that by the words "directly or indirectly" the maxim "*causa proxima non remota spectatur*" was excluded, and that a more remote link in the chain of causation was contemplated than the proximate and immediate cause, and held that the arbitrator's finding upon the facts that the insured's death was indirectly caused by war should be sustained. The court said:

> "The words in the condition 'caused by' and 'arising from' do not give rise to any difficulty. They are words which always have been construed as relating to the proximate cause. I am not sure whether the words 'traceable to' would of themselves necessarily go any further. They are very vague words and I should have been disposed to hold, if those were the only words, that, if the defendants choose to employ very vague words of that kind, the words must be read strictly against them and in accordance with the ordinary maxim. But the words which I find it impossible to escape from are 'directly and indirectly.' There does not appear to be any authority in which those words have been considered, and I find it impossible to reconcile them with the maxim '*causa proxima non remota spectatur.*' If it were contended that the result of the words is that the proximate cause, whether direct or indirect, is to be looked at, I should reply that that result does not appear to me to be consistent or intelligible. I am unable to understand what is an indirect proximate cause, and in my judgment the only possible effect which can be given to those words

is that the maxim '*causa proxima non remota spectatur*' is excluded, and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause. But a line must be drawn somewhere. For instance, the birth of Captain Ewing, even though it may be said to have led in the chain of causation to his being in the position in which he was killed, could not be considered as causing his death; and if on the facts it was possible to hold, in accordance with the principles I have enuciated, that the clause was not applicable, I should have been able to find that his representatives had a claim. But I am unable to hold that any principle excludes, upon these facts, a possible finding by the arbitrator that war was the indirect cause of this accident. If war had merely placed Captain Ewing in a position not specially exposed to any danger, and in that position a particular incident not connected with war caused his death, I think that most probably in that case the matter would not come within the condition. For instance, suppose that, in connection with the war, the assured had gone to a military camp not in any way specially exposed to lightning, but where lightning had struck and killed him; I should be disposed to think that the war was so remote from the death that in that case it could not be said that the death was indirectly caused by the war. If, however, the war had placed the assured in a position specially exposed to danger, as, for instance, in a place where he was specially exposed to being struck by lightning—if such a place can be conceived—and he was there struck and killed by lightning, it appears to me to be a question of fact, not of construction, whether the death was indirectly caused by war. In the present case the arbitrator has found, as a fact, that the assured's death was indirectly traceable to war; and it is clear upon the facts that he was placed in a position of special danger; namely, he had to be about the railway line, performing his military duties, at night, with the lights turned down, in consequence of war, and while doing his military duties in that position of special danger he was killed by reason of the special danger which prevails at that particular place, and to which he was exposed by reason of his military duties. In those circumstances I am unable to hold that the arbitrator could not reasonably find, as a matter of fact, that the death was indirectly caused by war."

The fourth case of McCahey vs. John Hancock Mutual Life Insurance Company, though decided by an inferior court will be regarded as the last word on the subject. This was an action on a life insurance policy issued to plaintiff's son who was at the time of its issuance a Second Lieutenant in the Marine

Corps of the United States Navy. His occupation as such was stated both in the application and in his answers to the medical examination. He also stated he was "subject to orders."

The policy contained a clause reading as follows:

> "The liability of the company hereunder during the first policy year shall be limited to the premiums paid hereon if the insured shall die by suicide; while sane or insane, during said year, or if he shall die during said year as result of military or naval service in time of war, or as a result of making or undertaking an ariel flight without a permit for such service or flight from the company, signed by the President, a Vice-President, the Secreatry or an Assistant Secretary."

The application contained a similar provision. The policy was issued after a state of war was declared between the United States and Germany. Some months thereafter the company wrote the insured that, should he receive orders for the front, he might telegraph for the permit immediately. No permit was applied for, nor was one issued.

While the insured was at his barracks in this country, he was killed by the accidental discharge of his revolver. The company claimed that it was liable under the policy only for the amount of premium paid by the insured. Held,

> "That the policy was to be construed most strongly against the insurer; that the war permit clause applied to combatant service only; and that, as the company had accepted the risk after war had been declared, knowing that the insured was in naval service, and there had been no change in his occupation or increase in hazard, the rule for new trial should be discharged and the motion for judgment n. o. v. refused."

The court said in the course of the opinion, after stating the rule that insurance policies are construed by the courts strongly against the insurer, and that courts are always prompt to seize hold of any circumstance to indicate an election by the insurer to waive a forfeiture, that:

> "In the case at bar it is clear that defendant, at the time of issuing its policy, knew that war had been declared; that the insured was a Second Lieutenant in the United States Navy, and that it was part of his duty to keep his firearms in proper condition. It was not then contracting with a person solely engaged in civilian life. With knowledge of those facts, it fixed and received its premium and

agreed that 'if the insured shall die during the continuance of this policy, the company will pay . . . to his mother, Mary B. McCahey,' the sum of $5,000. There was thereafter no change in the insured's occupation or his duties, nor did he increase the hazard by any change of residence, nor by the entrance into combatant service, either on sea or on land. Both parties anticipating the possibility of a change in the insured's service. That such change might have necessitated the payment of increased premium and the issuance of a 'war permit' appears from defendant's letter of May 31st, where it refers to the 'war permit,' and informs insured that 'should you receive orders to the front, you may telegraph us for the permit immediately,' and of June 2, 1917, where it informed him that the permit was necessary if he received 'orders involving service whereby you may be subject to the casualties of war or diseases incidental thereto, whether at sea or on land, . . . as it is quite possible for one to be subjected to the casualties involved in this present war without being ordered to the front line service.'

"Defendant, by its letter of May 31, 1917, itself plainly distinguished between the insured's service at that date and service requiring a 'war permit.' In order to warrant the insurer's present construction, it should have avoided all ambiguity, especially in view of the fact that the insured was a youth of twenty-one, engaged in the service of his country and anxious for his mother's protection in the event of his death. To require of him a hypercritical ingenuity in construing the carefully selected phrases of the insurer would be unwarranted and unreasonable.

"We are of opinion that the clause in this policy against 'military or naval service in time of war' refers to combatant service; that the insured and insurer have so construed the contract before, at and after the issuance of the policy, and that the existence of war and the insured's service were remotely connected with, but were not the proximate cause of, his death."

I am informed by the Associate Counsel of the defendant company in this case has decided to pay the claim in full; and to have the case dismissed, so that there will be no appeal to a court of final jurisdiction. The company while paying the claim in full maintains that it was entirely justified in contesting plaintiff's claim by reason of the failure to pay the war premium in accordance with the terms of the policy. However the company, after the termination of hostilities, found that the increase of mortality on its business by reason of the war was small, and has decided to return every premium col-

lected because the insured was engaged in military or naval service. This action necessarily compels it to recognize the claim in the McCahey case.

While this action on the part of the company is magnanimous, it is to be regretted that the case did not reach for decision a court of final jurisdiction.

Summarizing the effect of these four decisions, we have the Spanish-American war case, and the late English case sustaining the military and naval service clause. We have the McCahey case declining to uphold the clause upon the ground of estoppel. We have the Civil War case that cannot be considered in point since the assured was not in military or naval service.

In the McCahey case it will be noted that there is a strongly expressed *obiter dictum* disclosing a disposition *ex industria* of the court to construe the clause against the insurer. That court is in error in stating that from the opinion in the Larue case, it is apparent a different conclusion would have been reached if the insured had not died in actual combat. There is nothing in the opinion to justify that statement.

Under those conditions, it is evident that the particular words used in each clause will be come important.

Some of the clauses use the words: "*Death as a result of military or naval service.*" Others use the words: "*Death while engaged in military service.*" Still others use words excepting liability for "*entering military or naval service.*" And in some clauses will probably be found the words "*directly or indirectly.*"

With the disposition of the courts as shown in the said decisions, the opportunity for strict construction against the insurer, under the different phrases used in the military and naval clauses, is too obvious for any discussion here. It is evident that some of the terms used are much stronger than others.

The question of what may be considered as "military or naval service," within the terms of the said clause may also become important. Some of the clauses, in addition to military or naval service, also except services "allied thereto," such as Red Cross, Y. M. C. A., etc.

I believe that on the question of defining military and naval service, the definition given in the Soldiers and Sailors Relief

Act, passed by Congress on March 8, 1918, printed in the advance sheets of the *Federal Reporter* for April 25, 1918, will prove of some value.

In the absence of cases in point, some side light can be gained in the construction of some of the same words used in accident policies. The cases construing accident policies are collected in text-books and are so easily available that it would not be profitable to enter into same in this paper.

The fact that the military and naval service clause, in many instances, was attached to the policy as a rider, also promises to furnish a source of litigation, on the question as to whether or not the rider is a part of the policy contract. The same is true also of instances where the clause is contained in the policy but not in the application.

An ingenious contention has been made that where the insured has been drafted into enforced military service, the military or naval service clause in the policy does not apply to him, for the reason that it was a matter over which he had no control.

There will, undoubtedly, be many unique questions of construction presented to the courts for decision under the military and naval service clause. The litigation of these questions offers an opportunity for an appeal to the sympathy and patriotic sentiment of the court for, if possible, an even more strict construction against the insurer, than is already the rule in nearly every jurisdiction.

These cases will most probably arise out of instances where the insured died of disease or accident in service in the United States, without having obtained the required permit for such service, and the contention will be made that death did not necessarily result from such service but from a cause common to persons in civil as well as military life.

An appeal will be made to the sympathy of the court by the fact that in many instances the companies have minimized the hazard of service in the United States by making no extra charge for such service, and charging only for service abroad.

The havoc of death wrought by the epidemic of influenza in the military cantonments throughout the United States will probably force nearly every company into disputes under the military and naval service clause in their policies.

At the beginning of the war most of the companies apparently regarded the mere fact of entrance by the insured into military or naval service, whether in the United States or abroad, as an additional hazard, but competition and patriotism finally forced the great majority of the companies to consent to their insured engaging in military or naval service in the United States without the payment of any extra premium. In some instances, while making no charge for such service, the insured was required to obtain a written permit therefor.

The field for litigation under these conditions, that has been opened by the disaster worked by the epidemic among the young men in the military cantonments in this country, must at once be obvious. Dr. Woods Hutchinson, of Boston, it has been said, has predicted a total of 200,000 deaths from the influenza epidemic, and it has been roughly estimated that the scourge of 1918 will cost the companies approximately $40,000,000. Of course, these figures are not quoted to convey the idea that all of these losses occurred on lives exposed to military service, but the great number of death losses caused by the epidemic in military cantonments in the United States, and the litigation that will arise out of the clauses in policies referring to same, it would appear should hereafter cause companies to adopt a position on the seriousness of military and naval service that cannot be regarded as equivocal.

As a practical matter, the magnitude of the epidemic, when the authentic death losses in military and naval service are known, should furnish an experience that will permit the companies to definitely determine whether or not there is any serious additional hazard in times of epidemic from the exposure of a large number of men living in an enforced close contact, as in a military cantonment.

Since writing this paper my attention was called to the case of New York Life Insurance Co. vs. Hendren, a Virginia case, decided in 1874, reported in the 24 Grattan 536, mentioned in Cooley's Briefs, page 2217. I have read the case and find that it was decided upon the question of whether or not the company under the terms of its policy could forfeit the contract for nonpayment of premium. The company also raised the defense that the assured was in military service in violation of the conditions of the policy, which avoided the contact. However, this defense was not seriously considered as the proof was that

the assured had never entered military service, and was in no way connected with such service, except as a mere clerk in the office of the Adjutant General of the State of Virginia.

Mr. Cooley, on the same page supra, also mentions the case of Mutual Benefit Life Insurance Co. vs. Wise, a Maryland case, decided in 1871, reported in the 34 Md. 582. A reading of this case discloses that it was decided on the point of avoidance of the policy for a false misrepresentation, but there is a discussion therein of whether or not a Chaplain in the Confederate army could be considered as having been "employed" in military service, in violation of the warranty made by him that he had not been employed in such service. The court held that there was no satisfactory proof that the assured had ever been employed as a Chaplain in the army, and that it was the duty of the defendant company to prove this fact, and also that if he was so employed, that such employment was actual military service within the prohibition of the policy.

These cases, as well as the discussion of same by Mr. Cooley in his text should be considered when briefing the subject of this paper, as they will probably be cited in future litigation.

My attention was also called to the case of the United States vs. Mayer, reported in the advance sheets of the 252 *Fed. Reporter* 868 (pamphlet No. 3, dated Nov. 21, 1918). This is a criminal case, where the defendant was indicted under the Espionage Act, approved June 15, 1917. The only matter in the opinion therein that might be of interest in this discussion is the claim of the Government that all men between the ages of 18 and 45, by virtue of that mere fact, were in military or naval service. The court said that to so hold would be a very forced construction. That while all such persons are liable to be put into that service, that until that happening they were not yet in law or in fact "in the military or naval service of the United States within the intent and meaning of the Espionage Act."

I believe that it will be well to watch the decisions of the Federal Courts under the many prosecutions for violation of the laws adopted as war measures, for side lights on the construction of terms and provisions of the Federal laws governing military and naval service.